MICHIGAN
LAW REVIEW

VOL. XIII. NOVEMBER, 1914 No. 1

# A NEW INTERPRETATION OF THE SHERMAN ACT.

GENERALLY speaking, there never has been any serious disagreement as to the purpose of the SHERMAN ACT. Everyone —friends and foes, judges and economists, lawyers and laymen—admits that it was enacted with a view to foster competition, or, as Justice HARLAN put it in the *Northern Securities* case,[1] "to prescribe the rule of free competition."

But admitting this marked unanimity as to the purpose of the Act, that is as far as one can go. Concerning its meaning, as well as concerning its effectiveness—or, as its enemies would have it, lack of effectiveness—there prevails a hopeless contrariety of opinion. It is not too much to say that no law ever written into the statute books of the Federal government has stimulated so diversified sentiments in advocate and adversary alike; and it is, of course, to these unchangeable differences of opinion that we owe the existence of a large part of the flood of literature on the subject.

The friends of the law, of whom ex-President TAFT probably is the most notable as well as one of the stanchest, insist that the law has served a highly useful purpose and will become gradually still more effective; but even these men, avowedly friendly though they are, are not in complete agreement as to just what the law means. The enemies of the Act, on the other hand, while disagreeing just as hopelessly as do its friends on the correct interpretation of the statute, denounce it vigorously as having been a complete failure in practice. It might very reasonably be expected that those who attack the law for its failure to work out in practice would agree as to the way in which it failed. But that is not the case. On the one side we find those who insist that the Act has been emasculated by the decisions of the Supreme Court and is ineffectual for any purpose; on the other side the friends of "big business" are just as

[1] (1904) 193 U. S. 197.

sure that the SHERMAN ACT is a menace to the commercial and industrial development, and so necessarily to the prosperity, of the country.

The chaotic condition which inevitably has resulted, will be remedied only when the Supreme Court of the United States is given the opportunity, in a case whose facts are sufficiently simple that they may be readily and easily understood, to construe the Act in an opinion which, too, may be easily comprehended, at least by the profession. It is too early to predict what change in the existing law the new anti-trust statute will effect; but it may be taken as a practical certainty that the inerpretation placed on the SHERMAN ACT will continue to exert great influence as a judicial precedent.

The recent decision of the District Court of the United States in the case of *United States* v. *International Harvester Company*[2], is of so revolutionary a character that it invites further comment upon the SHERMAN ACT at this time; and additional relevancy and timeliness are given to the discussion by the fact that the *Harvester* case, when carried to the Supreme Court of the United States, will present, as has no previous case, the opportunity for a final and authoritative exposition of our much-mooted anti-trust law. It will enable the court to say just what is and what is not condemned by the law.

In August, 1902, the International Harvester Company was incorporated under the laws of New Jersey. It shortly acquired, by purchases effected by individuals acting as its agents, the stock and plants of five manufacturing concerns engaged in the manufacture of harvesting implements. In nearly all cases the purchase price was paid for in fully paid non-assessable stock of the purchasing company, that is, the International Harvester Company. The government alleged in its petition, seeking dissolution on the ground that the SHERMAN ACT was being violated, that the five companies acquired by the International Harvester Company produced more than 85 per cent of all harvesting machinery sold in the United States, and it was admitted in the answer that the companies produced 80 to 85 per cent of the binders, mowers, reapers and rakes. It is important, of course, that prior to the organization of the International Harvester Company and its acquisition of the property of the companies mentioned, those companies were engaged in active competition among themselves.

In the following year another competing company was acquired, giving to the International Harvester Company control of an even

[2] (August 12, 1914) 214 Fed. 987.

larger proportion of the business of producing and selling harvesting implements. It is only in connection with the acquisition of this plant and of three other plants subsequently acquired, that the District Court found any evidence of what might be termed unfair methods. For two years after it had been purchased by the International Harvester Company, the Osborne Company was permitted to continue to appear to be independent. During that period the Osborne Company persistently advertised that it was independent.

The case presented no question of oppressive treatment of competitors, the evidence showing that the defendant had refrained from resorting to unfair tactics to drive smaller competitors from the field. In fact, practically the only question raised by the case is this: Does the mere purchase by one corporation of several competing companies, at least some of which are successful and going concerns, and which together control a large majority of the production and sale of a given commodity, constitute a violation of the SHERMAN ACT?

The District Court found that it did, Judge HOOK concurring in Judge SMITH'S conclusion that the combination was one condemned by the Act. Judge SANBORN dissented. Each of the three judges wrote an opinion, but the opinion by Judge HOOK is a mere statement of his concurrence in Judge SMITH'S view, so the opinion of Judge SMITH is the prevailing opinion.

As marking out plainly the facts upon which the court based its conclusions, however, Judge HOOK'S concurring opinion is of great interest and importance. Following are two of the vitally significant statements he makes:

> "The International Harvester Company is not the result of the normal growth of the fair enterprise of an individual, a partnership or a corporation. On the contrary, it was created by combining five great competing companies which controlled more than 80 per cent of the trade in necessary farm implements and it still maintains a substantial dominance. That is the controlling fact; all else is detail."

And again:

> "It is but just, however, to say and to make it plain that in the main the business conduct of the company towards its competitors and the public has been honorable, clean and fair. Some petty dishonesties were tracked in at the start, mostly by subordinates who had been in the service of the old companies, but they were soon gotten rid of. In this connection

> it should also be said that specific charges of misconduct were made in the government's petition which found no warrant whatever in the proof."

It will be the purpose of this discussion to consider, first, whether the legal theory upon which the court based its conclusion that the defendant had violated the SHERMAN ACT is tenable; and then to ascertain, if possible, whether, assuming the court's *theory* to have been wrong, the *result* can be justified on any theory of the SHERMAN ACT as that statute had previously been construed. The first of the two tasks so assigned is comparatively simple; the second necessitates an analysis of the SHERMAN ACT and an attempt to discover just what the law, as construed by the Supreme Court of the United States, really means.

The discussion, then, divides itself naturally into two parts:

## I.

### THE FALLACY OF THE DISTRICT COURT'S REASONING.

In concluding that the International Harvester Company, by effecting a combination of the several theretofore competing companies, had created a combination in restraint of trade and therefore in violation of § 1 of the SHERMAN ACT, the majority opinion proceeds from a premise which is palpably and demonstrably fallacious. This premise is stated by the court as follows:

> "We think it may be laid down as a general rule that if companies could not make a legal contract as to prices or as to collateral services, they could not legally unite, and as the companies named did in effect unite, the sole question is as to whether they could have agreed on prices * * *. We think they could not have made such an agreement."

Again, elsewhere in the course of his opinion, SMITH, J., said:

> "Was this combination in restraint of trade? It substantially suppressed all competition between the five companies, and *the restraint of competition between combining companies is as illegal as destruction of competition between them without combining.*"

Since the court expressly based its conclusion upon the assumption just quoted, it naturally and logically addressed itself to a determination of the question whether the companies which had become component parts of the defendant combination might lawfully have entered into a price-fixing agreement. We say it *naturally and logically* proceeds to a determination of this question, for

the reason that by virtue of the premise which the court assumed at the outset to be true, the question whether the competing companies could have made an agreement as to prices became in the mind of the court the ultimate and controlling question in the case. As soon, therefore, as the court satisfied itself that the companies which had become a part of the Internationl Harvester Company would have been guilty of a violation of the SHERMAN ACT if they had entered into an agreement eliminating, among themselves, competition as to prices, it had to hold that a combination of those companies likewise constituted a violation of the Act.

We are not concerned at this juncture with the correctness or incorrectness of the court's conclusion that the several companies here involved could not lawfully have entered into an agreement concerning prices. What we are concerned with is in showing that the legal step, the construction of the SHERMAN ACT, by which the court moved from that position to a conclusion that it was unlawful for them to unite or combine, not only involves a *non sequitur,* but proceeds upon a clearly untenable interpretation of the SHERMAN ACT. We shall assume, therefore, for the sake of the discussion merely, that the companies comprising the International Harvester Company would not have been able, without violating § 1 of the SHERMAN ACT, to enter into an agreement concerning prices; and shall attempt to show that from that assumption it does not at all follow that the same companies could not lawfully combine.

In reaching its extraordinary conclusion with reference to the effect of the SHERMAN ACT, the court obviously overlooked or ignored certain fundamental and well-settled legal principles which have been universally applied as well to the examination of agreements in alleged unlawful restraint of trade at the common law as to the scrutinizing of agreements to ascertain whether they are in violation of the SHERMAN ACT.

The first proposition which the court apparently has overlooked is that *all* contracts or agreements having *for their sole or primary purpose* the restraint of trade or the elimination of competition were invalid at the common law and are made illegal by the SHERMAN ACT. If that be true, and we shall point out hereinafter that it is, then of course it would be unlawful for any two competitors, engaged in interstate commerce, to agree—whether by means of price regulation or a pooling arrangement or otherwise—to cease competing with each other. In considering such an agreement there can be no inquiry as to the amount or proportion of business done by either or both of the parties, nor as to the reasonableness or unreasonableness of the restraint. The very fact that there is a

restraint of trade, which furnishes the sole or primary motive for the agreement, makes the agreement unlawful, irrespective of all other considerations.

But it is not true that either at the common law or under the SHERMAN ACT there is any objection to a sale by one of two competitors of its business to the other, even though such a transaction would, of course, terminate the competition in which the two concerns theretofore had engaged. The reason is that in the case first supposed the agreement to suppress competition is the ultimate objective of the entire transaction; while in the second case the acquisition of the property by one of the competitors furnishes a main, lawful purpose to which the suppression of competition is naturally and necessarily incident. In the first case the restraint is unlawful, irrespective of its scope and therefore irrespective of all questions of reasonableness; in the second, the restraint is perfectly valid, provided only that it be no greater than is necessary to the protection of the purchaser—which is the modern test of the reasonableness of such a restraint. In other words, a contract whose sole purpose is to eliminate competition between the contractors is unenforceable, whether reasonable or unreasonable; while a contract which results in the elimination of competition, but which has a main lawful purpose, is valid and enforceable unless the restraint is greater than is necessary for the protection of the parties and therefore unreasonable.

The propositions just stated always have been recognized by the courts in passing upon the validity or invalidity of contracts alleged to be unenforceable because in restraint of trade; but nowhere has the distinction which the majority opinion in the *Harvester* case overlooked been so lucidly and clearly drawn as by Judge TAFT in the case of *United States* v. *Addyston Pipe Co.*[3]

In that case a number of competing pipe manufacturing companies formed an association the sole purpose of which was to eliminate competition among the members and thus enable the members to raise the prices of pipe. To accomplish the purpose the association had a representative board, to whom all inquiries for pipe were referred, and this board fixed the price at which the pipe should be sold. The various members of the association thereupon would submit bids *to the representative board,* and the concern agreeing to give the biggest bonus, to be distributed among the other members, was awarded the job. Other members of the association,

[3] (1898) 85 Fed. 271, affirmed by the Supreme Court of the United States in 175 U. S. 211.

as well as the one to whom the association had awarded the right to bid, would then submit bids to the purchaser; but these bids were in all cases higher than the bid of the member who had offered the biggest bonus, and were not *bona fide* bids at all, but were made solely for the purpose of keeping up a show of competition.

The significant feature of the case is, of course, the fact that there was no combination of properties, or of business, and no acquisition by any concern or "combination" of the competing companies, as there is in the *Harvester* case; it was merely an agreement by which competition between independent concerns was to be suppressed, and prices regulated—that, and nothing more.

On that state of facts it is not surprising that the Circuit Court of Appeals for the Sixth Circuit held that the agreement was in violation both of the common law and of the first section of the SHERMAN ACT and was unlawful.

It was urged with some persistency in the Circuit Court of Appeals that the restraint placed by the agreement upon the competition among the members was a reasonable restraint only, and therefore did not bring it within the inhibition of the Federal statute. And it was in this connection that Judge TAFT, in delivering the opinion of the court—consisting of himself, Mr. Justice HARLAN and Judge LURTON (later Mr. Justice LURTON)—discussed elaborately and exhaustively the question which we now have under consideration.

He first stated the contention of the defendants, in this respect, as follows:[4]

> "The argument for defendants is * * * that the restraints upon the members of the Association, if restraints they could be called, did not embrace all the states, and were not unlimited in space; that such partial restraints were justified and upheld at common law if reasonable, and only proportioned to the necessary protection of the parties; that in this case the partial restraints were reasonable."

In answering this contention, the court traced carefully the history of the common law relating to contracts in restraint of trade, beginning with the *Dyer's Case*,[5] touching upon the leading case of *Mitchel* v. *Reynolds*,[6] and coming down through the authoritative pronouncement of the House of Lords in *Nordenfeldt* v. *Maxim Nordenfeldt Co.*[7]

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[4] At page 279.
[5] Year Book, 2 Hen. V, folio 5 pl. 26.
[6] 1 P. Wms. 181.
[7] [1894] App. Cas. 535.

After expressing the opinion that "the inhibition against restraints of trade at common law seems at first to have had no exception" the court continued, at page 280:

> "After a time it became apparent to the people and the courts that it was in the interest of trade that certain covenants in restraint of trade should be enforced. It was of importance, as an incentive to industry and honest dealing in trade, that, after a man had built up a business with an extensive good will, he should be able to sell his business and good will to the best advantage, and he could not do so unless he could bind himself by an enforceable contract not to engage in the same business in such a way as to prevent injury to that which he was about to sell. * * * *Again, when two men became partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community.*"

Continuing, at page 281 the court said:

> "For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2 and 3) to the enjoyment by the buyer of the property, good will, or interest in the partnership bought; or (4) to the legitimate ends of the existing partnership, or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employe of the confidential knowledge acquired in such business."

The following language found at page 282, is significant:

> "It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that *no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract,* and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party."

Again, at page 282, it was said:

> "Where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. *There is in such contracts no main lawful purpose,* to subserve which partial restraint is permitted, and by which its reasonableness is measured, *but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster."*

Five cases, in each of which an agreement to restrain competition was upheld although the restriction upon competition was the sole object of the agreement, were discussed and answered by the court, which then cited an overwhelming array of authorities sustaining its own position.

The Supreme Court of the United States, in affirming the judgment of the Circuit Court of Appeals and holding the agreement to be in violation of the SHERMAN ACT, adopted Judge TAFT'S view. Thus, Mr. Justice PECKHAM quoted as follows from the opinion of the Circuit Court of Appeals:

> "It has been earnestly pressed upon us that the prices at which the cast-iron pipe were sold in pay territory were reasonable. * * * We do not think the issue an important one, because, as already stated, *we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract."*

Accordingly, it has been unequivocally declared by the Circuit Court of Appeals for the Sixth Circuit (two of whose three members either were then or became subsequently justices of the Supreme Court of the United States) and by the Supreme Court itself that the same rules are *not* applicable in determining the validity of a restraint of trade incidental to a main lawful purpose—such as the joining of two competitors in a co-partnership—and the validity of a restraint which itself furnishes the sole object of the contract. This doctrine has been universally approved, the only cases inconsistent with it being a few scattered cases, for the most part since overruled, chief of which are the five which Judge TAFT answered so conclusively. Moreover, in none of them does the distinction which Judge TAFT points out seem to have been called to the attention of, or considered by, the court.

It would be difficult to state more simply the point we are attempting to make than it was stated by Judge TAFT in the *Addyston Pipe* case. However, the conclusion there reached may be summarized in the following way:

Both at the common law and under the SHERMAN ACT two things were essential to the validity of a contract in restraint of trade. First, the imposition of the restraint upon trade must be ancillary and incidental to a main, lawful purpose. Secondly,—and there could arise no inquiry as to this feature until the first element had been found to exist—the restraint imposed must be no greater than was necessary to a full consummation of the indispensable main, lawful purpose.

From this it follows as a matter of course that *every* agreement between two competitors, by which they agreed to cease competing with each other, was unenforceable at the common law, and is made unlawful, in an affirmative and positive sense, by the SHERMAN ACT; whereas at the same time the common law never condemned the combination of two competitors, nor even an agreement by one competitor to cease competing, *so long as that agreement was ancillary to some such transaction as his selling out to his competitor and was no broader in scope than was required for the adequate protection of the purchaser.*

It is perfectly apparent, therefore, that the majority of the court had wandered hopelessly afield when it said that "If companies could not make a legal contract as to prices, they could not legally unite."

Upon the point we have just been considering hinges an interesting feature of the supposedly inconsistent interpretations which the Supreme Court of the United States has placed upon the first section of the SHERMAN ACT. The truth is that when the distinction

which we have pointed out above is borne in mind, the alleged inconsistency at once disappears.

It will be recalled that in the first two cases in which the SHERMAN ACT was before the Supreme Court of the United States for construction—namely *United States* v. *Trans-Missouri Freight Ass'n*,[8] and *United States* v. *Joint Traffic Ass'n*[9]—it was held, or at least said, that all contracts in restraint of trade were made unlawful by the SHERMAN ACT irrespective of whether they were reasonable or otherwise.

It likewise will be recalled that in the case of *Standard Oil Co.* v. *United States*[10] and *United States* v. *American Tobacco Co.*,[11] it was held, or at least said, that *all* contracts in restraint of trade were *not* made unlawful by the SHERMAN ACT, and that such contracts under the SHERMAN ACT, no less than at the common law, must be examined in the light of reason. In other words, the Supreme Court in the two later pronouncements just referred to, apparently has gone back to the common law test in determining the validity, under the SHERMAN ACT, of any given contract in restraint of trade.

Naturally enough the apparent departure by the Supreme Court from the supposed holdings in the *Trans-Missouri* and *Joint Traffic* cases caused widespread comment and some consternation—mostly in the lay press. Moreover, Chief Justice WHITE in delivering the opinion of the majority of the court in the *Standard Oil* case, devoted considerable space to reconciling the views there announced with the language of the earlier cases.

Nevertheless, the apparent inconsistency is only apparent, as may be shown a trifle more clearly, possibly, than Chief Justice WHITE showed it to be in the *Standard Oil* case. The basis for the explanation, which would seem to be a complete one, is afforded by the language used by Mr. Justice PECKHAM in the *Joint Traffic* case itself.

A detailed statement of the facts of the *Trans-Missouri* and *Joint Traffic* cases, or of either of them, is unnecessary. In the main, the facts of the two cases were similar. A voluntary association had been formed, having for its members a large number of railroads. The purpose of the association, and of the agreement under which the association was formed, was to eliminate competition among the members. There was no unification of the physical properties, or even of the stock ownership, of the various roads, but simply an

[8] (1897) 166 U. S. 290.
[9] (1898) 171 U. S. 505.
[10] (1911) 221 U. S. 1.
[11] (1911) 221 U. S. 106.

agreement with reference to the means of soliciting business, the fixing of rates and like matters.

It was in considering the status, under the SHERMAN ACT, of such an agreement as that, that the majority of the Supreme Court of the United States, speaking through Mr. Justice PECKHAM, said that all contracts in restraint of trade, and not merely those that were unreasonable, were condemned by the SHERMAN ACT. As applied *to contracts of the sort then under consideration* we have no doubt that the language used was perfectly accurate; and we venture to suggest that so far as contracts of the sort condemned in the *Joint-Traffic* and *Trans-Missouri* cases are concerned, the law is now—as it always has been—as was stated by Justice PECKHAM, and that the *Standard Oil* and *American Tobacco Company* cases have not changed nor purported to change in the remotest degree the law in that respect.

The reason for the apparent inconsistency between the language of Justice PECKHAM and the later language of Chief Justice WHITE is found in the fact that the two are talking *about things essentially different.* Which, it may be remarked in passing, is the source of most of the uncertainty and confusion that have attended the enforcement of the SHERMAN ACT.

Justice PECKHAM was speaking with reference to contracts whose sole or primary purpose was to restrain trade. That was the case presented by the defendant in each of the cases in which the language was used. And, of course, as was so clearly pointed out in the *Addyston Pipe* case, *all* contracts, whose *sole or primary* purpose is to restrain trade, are unlawful.

But Justice WHITE was speaking of a different sort of contract—the contract by which one competitor combines with another, or sells out to another. As to contracts of *that* sort, he says that the test of their lawfulness is their reasonableness. In that view, too, everyone will acquiesce. For in such cases there is, to use the words of Judge TAFT, "a main, lawful purpose"—the sale of the business or the like—"to which the restraint is ancillary, or incidental." And in that class of cases it becomes necessary to ascertain whether the restraint is reasonable or unreasonable.

That the distinction which we have just drawn between the two classes of cases was in the mind of Justice PECKHAM when he wrote his two opinions—or at least the later of the two opinions—is apparent from an examination of the language used. In the *Joint Traffic* case, counsel for the defendants sought to convince the court of the unsoundness of the supposedly broad position that the court had taken in the *Trans-Missouri* case, by arguing that the court's

construction of the Act (that is, that *all* contracts in restraint of trade are unlawful) would render illegal "the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop; and a sale of the good will of a business with an agreement not to destroy its value by engaging in similar business."

In answering this contention the court first said that the formation of a corporation or of a partnership had never, so far as it knew, been regarded as a contract in restraint of trade. It then continued:[12]

> "We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer restrained commerce or trade within any legal definition of that term; and the sale of the good will of a business with an accompanying agreement not to engage in a similar business was instanced in the Trans-Missouri case as a contract not within the meaning of the act; *and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business.*"

It is fairly apparent from the language just quoted that the court's language construing the Act had reference to restraints which were *not* "collateral to the main contract," but were the sole and direct purpose of the contract.

Following the language quoted, Justice PECKHAM proceeded to indicate anew his view that the SHERMAN ACT was confined in its operation to contracts which *directly* restrained interstate trade or commerce; and that contracts in which the restraint of trade is collateral to some main purpose restrain trade, if at all, *indirectly and not directly,* and are not therefore within the purview of the SHERMAN ACT.

Consequently when we compare the opinions in the *Traffic Association* cases with the opinion in the *Standard Oil* case, what we have is a misleading, but wholly unsubstantial, difference in language. The result arrived at is the same, but the means by which the result is reached are different.

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[12] 171 U. S. 505 at page 567.

This, of course, is what is meant by Chief Justice WHITE when he says at page 66 of the opinion in the *Standard Oil* case, after pointing out that in the earlier cases the test of the directness of the restraint had been the test:

> "From this it follows, since that rule [that is, the rule of *reasonableness*] and the result of the test as to *direct* or *indirect,* in their ultimate aspect, come to one and the same thing, that the difference between the two is therefore only that which obtains between things which do not differ at all."

Consequently, whether we adopt the terminology of Justice PECKHAM or that of Chief Justice WHITE, we arrive inevitably at the same conclusion, which is the one reached and clearly stated in the *Addyston Pipe* case; and whichever language we may choose to adopt there can not be the slightest doubt that the elimination of competition between independent companies without a unification of ownership is one thing—because there, to use the language of Justice PECKHAM the restraint is *direct,* or to use the language of Judge TAFT, is the main and primary purpose of the contract; whereas the elimination of competition between competing companies by effecting a unification of ownership is something entirely different, and invokes the application of entirely different rules of law—for in the case last supposed the restraint is not *direct* (to use Justice PECKHAM'S theory) but is collateral to the main contract, which is one of sale or lease or something similar.

Contracts of the first class—that is, contracts to eliminate competition without combining—are unlawful in any event; those of the second class are unlawful only if the restraint is, in legal theory, unreasonable.

It is clear, therefore, that from the fact that the various independent companies which combined to form the International Harvester Company could not legally have entered into a price-fixing agreement *without combining,* it does not at all follow that these same companies could not combine and *thereby, as a necessary incident* to such act of combining, eliminate competition among themselves.

Judge SMITH, in writing the majority opinion in the *Harvester* case cited three cases in support of his ultimate proposition of law, which we have been attempting to disprove. Not one of those cases supports the proposition for which it is cited. One of the cases, for instance, is *Addyston Pipe Co.* v. *United States,*[13] which far from

[13] (1898) 85 Fed. 271, affirmed by the Supreme Court of the United States in 175 U. S. 211.

holding that companies which may not enter into a price-fixing agreement may not consolidate, distinctly points out that very different rules of law are applicable in the two cases.

Another case cited is *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*[14]

In that case the plaintiff had sued on a contract and the defendant interposed the defense that the plaintiff was an unlawful combination in violation of § 1 of the SHERMAN ACT. Since the plaintiff demurred to this defense, the facts pleaded were admitted to be true, and the question for the Supreme Court to decide was whether under the facts alleged the plaintiff was an unlawful combination.

A number of persons and corporations, making and selling 98 per cent of all the wall paper manufactured and sold in the United States, had entered into a combination to which was given the name Continental Wall Paper Co.; and for the purpose of limiting the production and enhancing the price of wall paper they appointed a committee to adopt rules governing the manner of conducting the business of the members, of fixing prices at which wall paper should be sold, and determining the division of profits among the various members, not in proportion to their production and sales, but in proportion to their capacity. But the all-significant fact is that there was no sale of the business of any of the firms joining the combination; they merely appointed a committee to fix prices and pool the profits. For, as was alleged in the answer "said corporations and persons retain the ownership of their several plants and business, and preserve and continue their separate identities, and operate said several manufactories and business as before."

Clearly, there was in that case no purchase of a competing business to which the restriction upon competition was incidental or ancillary, but on the contrary the case falls squarely within the category of those in which, as said in the *Addyston Pipe* case, the restraint of trade was the sole and primary purpose of the agreement.

Precisely the same thing is true of *Swift & Co.* v. *United States,*[15] the other case relied upon. That case arose out of a combination entered into by various competing packing concerns, by which they agreed not to bid against each other and by which they agreed upon a method of price fixing. It was purely and simply an agreement to eliminate competition among rival packing companies. The case contains no intimation that it would have been unlawful for one of the defendants to have *purchased* the plant or business of one or

[14] (1909) 212 U. S. 227, 53 L. Ed. 486.
[15] (1905) 196 U. S. 375.

more of its competitors. The case, like the two other cases cited, has no bearing on the question.

It seems reasonably clear, therefore, that whatever may be the status of the International Harvester Company under a correct interpretation of the SHERMAN ACT—a question which is reserved for the succeeding part of this discussion—the view that it has been guilty of a violation of the Act cannot be sustained on the theory upon which the District Court reached that conclusion. The Supreme Court may affirm the judgment of the District Court, but it will have either to affirm it on a ground other than that relied upon by Judges SMITH and HOOK, or to give countenance to a proposition which is as shocking as it is novel. And in view of the previous pronouncements of the Supreme Court it is as near a practical certainty as anything of the sort may be that the view of the law, adopted by the District Court, will not be approved on appeal.

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*Chicago.*

(To be continued)